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*Pro Hac Vice Application*

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA  
TUCSON DIVISION**

Center for Biological Diversity, a non-  
profit organization,

Plaintiff,

v.

U.S. Forest Service; and U.S. Fish and  
Wildlife Service,

Defendants,

and

Spur Ranch Cattle Company, *et al.*

Defendant-Intervenors

Case No.: 4:20-cv-0020-DCB

**FIRST AMENDED COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF**

## INTRODUCTION

1  
2 1. Plaintiff Center for Biological Diversity (“Center”) brings this action  
3 against the U.S. Forest Service (“USFS”) and U.S. Fish and Wildlife Service (“FWS”)  
4 (collectively, “the Agencies”) for violations of the Endangered Species Act (“ESA”)  
5 arising from USFS final agency actions authorizing domestic livestock grazing on 36  
6 grazing allotments within the upper Gila River watershed on the Apache-Sitgreaves and  
7 Gila National Forests, including the issuance of term grazing permits, allotment  
8 management plans (“AMPs”), and allotment annual operating instructions (“AOIs”), as  
9 well as the Forest Service’s failure to prevent unlawful livestock grazing on an additional  
10 4 allotments that have been purportedly closed to grazing.

11 2. The aquatic and streamside riparian habitats of the upper Gila River  
12 watershed within the Apache-Sitgreaves and Gila National Forests are occupied by listed  
13 threatened and endangered species including the yellow-billed cuckoo, southwestern  
14 willow flycatcher, Chiricahua leopard frog, Gila chub, narrow-headed and northern  
15 Mexican garter snakes, spikedace, and loach minnow.

16 3. Scientific study of the impacts of livestock grazing on aquatic and riparian  
17 habitats in the Southwest is extensive and universally shows severe and lasting negative  
18 impacts such that near complete exclusion of cattle is widely accepted as an essential  
19 cornerstone for preserving stream health, water quality and quantity, and endangered  
20 species habitat within grazed areas.

21 4. For two decades, the Agencies have committed to the exclusion of cattle  
22 from riparian areas—typically through fencing—as a foundation for meeting their  
23 obligations under the Endangered Species Act to ensure that USFS’s grazing  
24 authorizations do not jeopardize the continued existence of endangered species, or result  
25 in the destruction or adverse modification of their designated critical habitat.  
26 Specifically, in carrying out their consultation duties pursuant to section 7 of the ESA for  
27 the individual grazing allotment authorizations challenged in this action, the Agencies  
28 have determined that the effects of domestic livestock grazing are not likely to adversely

1 impact endangered species dependent on aquatic and riparian habitat based largely on  
2 commitments to exclude this streamside habitat from cattle and to have USFS regularly  
3 monitor riparian areas to ensure that the fencing exclusions remain intact and effective.

4       5. Plaintiff Center for Biological Diversity conducted on-the-ground  
5 assessments to determine if cattle are present within riparian areas excluded from cattle  
6 on grazing allotments in the Apache-Sitgreaves and Gila National Forests in 2017, 2018,  
7 and 2019. These assessments documented that the purported fencing exclusions were  
8 frequently in disrepair or simply nonexistent, resulting in widespread unauthorized cattle  
9 presence with associated damage to riparian areas and occupied or suitable endangered  
10 species habitat. The Center provided these assessments to USFS.

11       6. The ESA places ongoing obligations on federal agencies to ensure that their  
12 actions do not jeopardize the continued existence of endangered species or adversely  
13 modify or destroy their designated critical habitat, including the duty to reinitiate section  
14 7 consultations in four circumstances. 50 C.F.R. § 402.16(a)(1)-(4). Agencies must  
15 reinitiate consultation, for example, “[i]f the amount or extent of taking specified in the  
16 incidental take statement is exceeded,” when “[n]ew information reveals effects of the  
17 action that may affect listed species or critical habitat in a manner or to an extent not  
18 previously considered,” or when “[t]he identified action is subsequently modified in a  
19 manner that causes an effect to the listed species or critical habitat that was not  
20 considered in the biological opinion.” *Id.* § 402.16(a)(1)-(3).

21       7. The Agencies were required to reinitiate and complete consultation when  
22 presented with evidence documenting extensive cattle use and associated lack of USFS  
23 monitoring within the riparian streamside areas of specific allotments within the upper  
24 Gila River watershed in the Apache-Sitgreaves and Gila National Forests. The USFS’s  
25 failure in fact to exclude domestic livestock from occupied threatened and endangered  
26 species habitat, and designated critical habitat, or to take immediate corrective action to  
27 remedy these failures, undermines the Agencies’ conclusions regarding the impact of  
28 those specific grazing allotment authorizations on listed species and their designated

critical habitat, and specifically triggers the reinitiation thresholds at 50 C.F.R. § 402.16(a).

8. In addition, the Agencies were required to reinitiate and complete consultation due to the listing and designation of critical habitat for threatened or endangered species subsequent to the most recent section 7 consultations for the upper Gila River watershed allotments.

9. Plaintiff provided sixty (60) days' Notice of its Intent ("NOI") to file this suit pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), by letter to the Agencies dated July 17, 2019.

10. On October 16, 2019, the USFS Southwestern Regional Forester responded to Plaintiff's NOI. The response does not resolve the ESA violations alleged in Plaintiff's NOI. Accordingly, Plaintiff seeks declaratory and injunctive relief to enforce the ESA's requirements with respect to USFS agency actions authorizing grazing on the specific allotments discussed further below and listed in **Table 1** (organized by National Forest, and then by river or stream).

11. On September 16, 2020, Plaintiff sent a supplemental NOI providing additional details regarding alleged ESA violations, including the addition of three allotments that were not included in the original NOI. The supplemental NOI also provided additional details regarding alleged ESA section 7(a)(1) violations. The Agencies have not responded to this supplemental NOI.

## JURISDICTION AND VENUE

12. This Court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(c),(g) (action arising under ESA citizen suit provision); 5 U.S.C. § 702 (APA review); and 28 U.S.C. § 1331 (federal question jurisdiction).

13. The Court may grant the relief requested under the ESA, 16 U.S.C. § 1540(g); the APA, 5 U.S.C. §§ 701-706; and 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief).



1 including the Blue River, Eagle Creek, and San Francisco River on the Apache-  
2 Sitgreaves National Forests in Arizona, and the Gila River Headwaters (West, Middle,  
3 and East Forks), Gila River, Tularosa River, and San Francisco River on the Gila  
4 National Forest in New Mexico, as well as areas within those rivers' larger watershed  
5 that are impacted by unlawful grazing. Plaintiff has members who have concrete plans to  
6 return to these areas during the next year.

7         19. Plaintiff's members also specifically seek to observe or study the yellow-  
8 billed cuckoo, southwestern willow flycatcher, Chiricahua leopard frog, narrow-headed  
9 and northern Mexican garter snakes, Gila chub, spikedace, and loach minnow in their  
10 natural habitat in the upper Gila River watershed within the Apache-Sitgreaves and Gila  
11 National Forests, including the Blue River, Eagle Creek, and the San Francisco River in  
12 the Apache-Sitgreaves National Forests in Arizona, and the Gila River Headwaters  
13 (West, Middle, and East Forks), Gila River, Tularosa River, and San Francisco River in  
14 the Gila National Forest in New Mexico.

15         20. Plaintiffs' members and staff derive recreational, professional, scientific,  
16 educational, aesthetic, spiritual and other benefits from their use of the specific areas of  
17 the upper Gila River watershed within the Apache-Sitgreaves and Gila National Forests  
18 described above. These interests of Plaintiff's members, have been, are being, and will  
19 continue to be adversely harmed by the Agencies' failure to meet their procedural and  
20 substantive duties under section 7 of the ESA. Through the Agencies' actions and failures  
21 to act, domestic livestock are being allowed to use streamside riparian areas, resulting in  
22 streambank trampling, soil compaction, removal of riparian vegetation, and deposition of  
23 cattle feces, resulting in water quality degradation, dewatering of streams, habitat  
24 destruction, and related adverse impacts to endangered species and other natural resource  
25 values, which in turn significantly and directly harms Plaintiff's members. The injuries  
26 described are actual, concrete injuries presently suffered by Plaintiff and its members,  
27 and they will continue to occur unless this Court grants relief. The relief sought herein—  
28 an Order compelling the Agencies to reinstate and complete section 7 consultations for

1 the challenged actions while taking immediate corrective actions to effectively exclude  
 2 cattle from streamside and riparian areas and remedy the damage caused by those  
 3 cattle—would redress those harms. Plaintiffs and their members have no other adequate  
 4 remedy at law.

5 21. Defendant UNITED STATES FOREST SERVICE is an agency within the  
 6 Department of Agriculture. Like all federal agencies, the USFS must comply with all  
 7 applicable requirements of the ESA.

8 22. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is the  
 9 agency within the Department of the Interior that is charged with implementing the ESA,  
 10 and shares responsibility for reinitiation and completion of consultation under section 7.

### 11 **LEGAL BACKGROUND**

12 23. The Endangered Species Act, 16 U.S.C. §§ 1531-1544, is “the most  
 13 comprehensive legislation for the preservation of endangered species ever enacted by any  
 14 nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Its fundamental purposes  
 15 are “to provide a means whereby the ecosystems upon which endangered species and  
 16 threatened species depend may be conserved [and] to provide a program for the  
 17 conservation of such endangered species and threatened species . . . .” 16 U.S.C.  
 18 § 1531(b).

19 24. To achieve these objectives, the ESA directs the Secretary of the Interior,  
 20 through FWS, to determine which species of plants and animals are “threatened” and  
 21 “endangered” and place them on the list of protected species. *Id.* § 1533. An  
 22 “endangered” or “threatened” species is one “in danger of extinction throughout all or a  
 23 significant portion of its range,” or “likely to become endangered in the near future  
 24 throughout all or a significant portion of its range,” respectively. *Id.* § 1532(6), (20).

25 25. Once a species is listed, the ESA provides a variety of procedural and  
 26 substantive protections to ensure not only the species’ continued survival, but its ultimate  
 27 recovery, including the designation of critical habitat, the preparation and implementation  
 28 of recovery plans, the prohibition against the “taking” of listed species, and the



1 requirement for interagency consultation. *Id.* §§ 1533(a)(3), 1533(f), 1536, 1538.

2       26. The ESA recognizes that federal agencies such as USFS have a critical role  
3 to play in meeting these statutory purposes. The ESA establishes that it is “the policy of  
4 Congress that all Federal departments and agencies shall seek to conserve endangered  
5 species and threatened species and shall utilize their authorities in furtherance of the  
6 purposes” of the ESA. *Id.* § 1531(c)(1).

7       27. To implement this policy, section 7(a)(1) of the ESA requires that “Federal  
8 agencies shall, in consultation with and with the assistance of [FWS], utilize their  
9 authorities in furtherance of the purposes of this Act by carrying out programs for the  
10 conservation of endangered species and threatened species.” *Id.* § 1536(a)(1). The ESA  
11 defines “conserve” and “conservation” to mean “the use of all methods and procedures  
12 which are necessary to bring any endangered species or threatened species to the point at  
13 which the measure provided pursuant to this chapter are no longer necessary.” 16 U.S.C.  
14 § 1532(3).

15       28. Section 7(a)(2) of the ESA requires that “[e]ach Federal agency shall, in  
16 consultation with . . . [FWS], [e]nsure that any action authorized, funded, or carried out  
17 by such agency . . . is not likely to jeopardize the continued existence of any endangered  
18 species or threatened species or result in the destruction or adverse modification of  
19 [critical habitat].” *Id.* § 1536(a)(2).

20       29. FWS’ regulations define an agency “action” to mean “all activities or  
21 programs of any kind authorized, funded, or carried out, in whole or in part, by Federal  
22 agencies.” 50 C.F.R. § 402.02.

23       30. Section 7(a)(2) of the ESA contains both procedural and substantive  
24 mandates. Substantively, it requires that all federal agencies avoid actions that: (1)  
25 jeopardize the continued existence of listed species; or (2) destroy or adversely modify  
26 their designated critical habitat. Procedurally, to ensure compliance with the substantive  
27 standards, the federal agency taking action and FWS take part in a cooperative analysis of  
28 potential impacts to listed species and their designated critical habitat known as the



1 consultation process. 16 U.S.C. § 1536(a)(2). The consultation process has been  
2 described as the “heart of the ESA.” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d  
3 472, 495 (9th Cir. 2011).

4 31. If listed or proposed species may be present in the project area, the action  
5 agency must prepare a “biological assessment” to determine whether the listed species  
6 may be affected by the proposed action. 50 C.F.R. § 402.12.

7 32. If the action agency determines that its proposed action may affect any  
8 listed species or critical habitat, the agency must normally engage in “formal  
9 consultation” with FWS. *Id.* § 402.14. However, the agency need not initiate formal  
10 consultation if, as a result of the preparation of a biological assessment or as a result of  
11 informal consultation with FWS, the agency determines, with the written concurrence of  
12 FWS, that the proposed action is not likely to adversely affect any listed species or  
13 critical habitat. *Id.* §§ 402.13, 402.14(b)(1).

14 33. Through the formal section 7 consultation process, FWS prepares a  
15 “biological opinion” as to whether the action is likely to jeopardize the species or destroy  
16 or adversely modify critical habitat and, if so, suggests “reasonable and prudent  
17 alternatives” to avoid that result. *Id.* § 402.14; 16 U.S.C. § 1536(b)(3)(A). If the  
18 biological opinion concludes that the action is not likely to jeopardize the continued  
19 existence of a listed species, and will not result in the destruction or adverse modification  
20 of critical habitat, FWS must provide an “incidental take statement,” specifying the  
21 amount or extent of such incidental taking on the species and any “reasonable and  
22 prudent measures” that FWS considers necessary or appropriate to minimize such impact,  
23 and setting forth the “terms and conditions” that must be complied with by the action  
24 agency to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

25 34. Agencies must reinitiate consultation on agency actions over which the  
26 action agency retains, or is authorized to exercise, discretionary involvement or control,  
27 if: (a) the amount or extent of taking specified in the incidental take statement is  
28 exceeded; (b) new information reveals effects of the action that may affect listed species

1 or critical habitat in a manner or to an extent not previously considered; (c) the identified  
2 action is subsequently modified in a manner that causes an effect to the listed species or  
3 critical habitat that was not considered in the biological opinion or written concurrence;  
4 or (d) a new species is listed or critical habitat designated that may be affected by the  
5 identified action. 50 C.F.R. § 402.16(a)(1)-(4).

6 35. After the initiation or reinitiation of section 7 consultation, the action  
7 agency is prohibited from making any irreversible or irretrievable commitment of  
8 resources with respect to the agency action. 16 U.S.C. § 1536(d).

9 36. During the consultation process, federal agencies must “use the best  
10 scientific and commercial data available.” *Id.* § 1536(a)(2); 50 CFR § 402.14(d).

## 11 BACKGROUND

### 12 A. The National Forests of the Upper Gila River Watershed

13 37. The Gila River originates in southwestern New Mexico and flows westward  
14 across Arizona to its confluence with the Colorado River north of Yuma (although much  
15 of the lower watershed is commonly dry). The upper portion of the watershed—defined  
16 as all of the land drained by that portion of the river and its tributaries east of Coolidge  
17 Dam—is largely comprised of federal lands, including National Forests (thirty-seven  
18 percent) and public lands administered by the Bureau of Land Management (twenty  
19 percent).

20 38. The Apache-Sitgreaves and Gila National Forests administer the large  
21 majority of national forest lands within the upper Gila River watershed. Within the Gila  
22 National Forest, the West Fork, Middle Fork, and the East Fork Headwaters of the Gila  
23 River begin the river’s journey down from the heights of the rugged Mogollon  
24 Mountains, as well as the Black Range along the continental divide. These headwaters  
25 join together to form the mainstem of the Gila River within the Gila Wilderness. After  
26 emerging from the Gila Wilderness near the town of Glenwood, New Mexico, the river  
27 then flows south and west across the Arizona state line.  
28

1           39. In Arizona, the Blue River drains a large portion of the Blue Range within  
 2 the Apache National Forest as it flows southward, eventually joining the waters of the  
 3 San Francisco River at the southern end of the range. Although the San Francisco River  
 4 has its headwaters in Arizona, much of it flows through the Gila National Forest in New  
 5 Mexico before flowing back into Arizona. These combined waters then flow into the  
 6 larger Gila River.

7           40. Together, the upper Gila River, the San Francisco River, the Blue River,  
 8 and their tributaries define an expansive undeveloped area that includes the first  
 9 designated Forest Service wilderness (the Gila) and the last remaining Forest Service  
 10 primitive area (the Blue Range). In addition to its high concentration of endangered  
 11 species, the upper Gila River watershed and adjacent areas contain one of the world's  
 12 largest ponderosa pine forests (and one of the first areas to successfully reintroduce fire to  
 13 the landscape), which sustains abundant wildlife including wild turkeys, eagles, deer,  
 14 pronghorn, elk, bighorn sheep, javelina, cougars, and black bears, as well as the  
 15 reintroduced population of Mexican gray wolves.

16           41. In addition to the pervasive impacts of domestic cattle grazing, persistent  
 17 drought, dewatering, global warming, invasive species, and other impacts have in recent  
 18 years taken an increasing toll on southwestern ecosystems, resulting in the recent listing  
 19 of numerous threatened or endangered species dependent on southwestern riparian areas.  
 20 Reflecting these impacts, and the looming threat of a major diversion project, the Gila  
 21 was named the nation's most endangered river in 2019.

22           **B. Public Lands Grazing is a Primary Threat to Endangered Species**  
 23           **Dependent on Southwestern Streams**

24           42. Due in part to their undeveloped nature and remoteness, the national forests  
 25 of the upper Gila River watershed are refugia for many listed threatened and endangered  
 26 species, including the yellow-billed cuckoo, southwestern willow flycatcher, Chiricahua  
 27 leopard frog, narrow-headed and northern Mexican garter snakes, Gila chub, spikedace,  
 28

1 loach minnow, and more. However, land use within the national forests often negatively  
2 impacts these species. Like the large majority of public lands within the arid west, the  
3 Gila and Apache-Sitgreaves National Forests routinely authorize domestic livestock  
4 grazing that poses significant environmental risks to arid Southwestern ecosystems,  
5 particularly to streamside and riparian areas but also including adjacent upland areas.

6 43. Scientific study on the impacts of livestock grazing on aquatic and riparian  
7 habitats in the Southwest is extensive and universally shows severe and lasting negative  
8 impacts such that near complete exclusion of cattle is widely accepted as a minimum  
9 baseline management strategy in preserving stream health. Livestock grazing has both  
10 direct and indirect effects on streams. Livestock directly affect riparian habitat through  
11 removal of riparian vegetation. Loss of riparian vegetation in turn raises water  
12 temperatures, reduces bank stability, and eliminates an important structural component of  
13 the stream environment that contributes to the formation of pools. Grazing physically  
14 alters streambanks through trampling and shearing, leading to bank erosion. In  
15 combination, loss of riparian vegetation and bank erosion can alter channel morphology,  
16 including increased erosion and deposition, downcutting and an increased width/depth  
17 ratio, all of which lead to a loss of pool habitats and shallow side and backwater habitats  
18 used by several of the listed species that are the subject of this lawsuit.

19 44. Livestock also indirectly impact aquatic and riparian habitats by  
20 compacting soils, altering soil chemistry, and reducing vegetation cover in upland areas,  
21 leading to increased severity of floods and sediment loading, lower water tables, and  
22 altered channel morphology.

23 45. One consequence of these impacts to watersheds is a reduction in the  
24 quantity and quality of pool habitat. A lowered water table, for example, results in direct  
25 loss of pool habitats, simply because water is not available to form pools. Increased  
26 erosion and sedimentation results in filling of pools with sediments. Channel incision and  
27 increased flood severity both can scour out pools, reducing habitat complexity and  
28

1 resulting in shallow, uniform streambeds, all of which harms the species at issue in this  
2 suit.

3 46. Because of the severity and broad array of these impacts, livestock grazing  
4 is one of the most prevalent causes of the federal listing of species in this region,  
5 including the following eight threatened and endangered species, all of which are  
6 specifically dependent on aquatic and streamside riparian habitat: **Yellow-billed cuckoo**  
7 **(western DPS)**: listed as threatened October 3, 2014 (79 Fed. Reg. 59,992); proposed  
8 critical habitat November 12, 2014 (79 Fed. Reg. 67,154); **Southwestern willow**  
9 **flycatcher**: listed as endangered February 27, 1995 (60 Fed. Reg. 10,694); final critical  
10 habitat January 3, 2013 (78 Fed. Reg. 344); **Gila chub**: listed as endangered and final  
11 critical habitat November 2, 2005 (70 Fed. Reg. 66,664); **Loach minnow and spikedace**:  
12 uplisted to endangered and final critical habitat February 23, 2012 (77 Fed. Reg. 10,810);  
13 **Chiricahua leopard frog**: listed as threatened June 13, 2002 (67 Fed. Reg. 40,657,  
14 40,665); final critical habitat March 30, 2012 (77 Fed. Reg. 16,324); **Northern Mexican**  
15 **garter snake and narrow-headed garter snake**: listed as threatened July 8, 2014 (79  
16 Fed. Reg. 38,678); proposed critical habitat July 10, 2013 (78 Fed. Reg. 41,550).

17 **C. Two Decades Ago, USFS Committed to Remove Cattle from**  
18 **Southwestern Streams**

19 47. Prior to the late 1990s, USFS routinely authorized cattle grazing on  
20 Southwestern streams and riparian areas despite the mounting evidence of its devastating  
21 impacts on those areas and the imperiled species that depend upon them.

22 48. In *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, the Center sued  
23 USFS for its failure to fulfill its Endangered Species Act section 7 consultation duties  
24 with respect to the impacts of 158 grazing allotments on southwestern willow flycatcher,  
25 loach minnow, and spikedace. No. CV-97-666-TUC-JMR (D. Ariz. Oct. 23, 1997).

26 49. Under a resultant April 1998 settlement agreement, USFS agreed to  
27 immediately remove cattle from ninety-nine percent of riparian habitats within the  
28

1 allotments at issue until FWS issued a biological opinion pursuant to section 7 of the  
2 ESA.

3 50. These obligations catalyzed USFS, in cooperation with FWS, to develop  
4 “Grazing Guidance Criteria,” to guide ESA section 7 consultations regarding grazing and  
5 to apply those criteria to all 962 grazing allotments within USFS Region 3 (Southwestern  
6 Region.). *See Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, Nos. CV-97-666-  
7 TUC-JMR, CV-97-2562-PHX-SMM, 2001 U.S. Dist. LEXIS 25027, \*6-8 (D. Ariz. Mar.  
8 30, 2001) (emphasis added).

9 51. Since that time, grazing exclusions, as well as annual monitoring to ensure  
10 the effectiveness of those exclusions, have served as a cornerstone for USFS ESA  
11 compliance in relation to its grazing program and individual decisions authorizing  
12 grazing on individual grazing allotments.

13 52. 36 of the 40 allotments at issue in this suit have been considered in specific  
14 consultations described below. The remaining 4 allotments are considered vacant by  
15 USFS. In accordance with the Grazing Criteria and substantive ESA obligations to avoid  
16 jeopardizing the continued existence of listed species, or destroy or adversely modify  
17 designated critical habitat, the consultations at issue in this suit have relied upon USFS  
18 commitments to exclude livestock from riparian areas, ensured through consistent USFS  
19 monitoring, to justify conclusions of no effect or not likely to adversely affect  
20 determinations in relation to aquatic or riparian dependent endangered species.

21 **D. The Center Conducted Assessments Documenting Widespread and**  
22 **Significant Streamside Damage from Cattle on Apache-Sitgreaves**  
23 **and Gila National Forest Grazing Allotments**

24 53. Plaintiff Center for Biological Diversity conducted an on-the-ground  
25 assessment in 2017 to determine if cattle are present within riparian areas excluded from  
26 grazing on 23 permitted allotments, and 4 purportedly closed or vacant allotments, in the  
27 Gila National Forest, and to document the extent and intensity of impacts from cattle  
28 grazing where present. In total, the Center surveyed riparian areas along approximately

1 106 stream miles on the San Francisco, Tularosa, and Gila Rivers, and portions of major  
2 tributaries including Big Dry Creek, Dry Blue Creek, Frieborn Canyon, Pace Creek,  
3 Negrito Creek, Mogollon Creek, Taylor Creek, and Beaver Creek. Observations of cattle  
4 impacts were collected for more than 150 riparian segments, each ¼ to mile in length.

5 54. In conducting the assessments, field surveyors recorded livestock grazing  
6 impacts to riparian vegetation, soils, and streambanks, and documented the condition of  
7 exclosure fencing. Data were collected in six categories and were scored based on the  
8 severity and frequency of impacts. Stream reaches were ranked with absent, light,  
9 moderate, or significant grazing impacts. All data is supported by several hundred  
10 georeferenced photographs documenting livestock presence and their impacts.

11 55. These assessments documented that the purported fencing exclusions were  
12 frequently in disrepair or simply nonexistent, resulting in widespread unauthorized cattle  
13 presence with associated damage to riparian areas and occupied or suitable endangered  
14 species habitat. More than 60% of stream miles were ranked with significant impacts (64  
15 miles), while an additional 11.7% of stream miles showed moderate impacts (12.4 miles),  
16 and 16.2% had light impacts (17.2 miles). Only 11.2% of surveyed areas were absent of  
17 cattle impacts (11.8 miles). In numerous instances, surveyors observed cattle directly  
18 present in riparian and streamside areas.

19 56. The Center compiled these survey results into a detailed report in March  
20 2018 and provided this report to USFS. USFS has not taken adequate corrective action in  
21 response.

22 57. As stated in the survey's summary:

23 “Across the Gila National Forest there are widespread examples of fences down  
24 and in disrepair between private property and Forest Service land. This presents  
25 virtually unlimited access for cattle to cross into excluded areas ... Throughout the  
26 majority of these riparian areas that are supposed to be excluded from grazing there  
27 is intense pressure on native grasses resulting in their displacement with non-  
28 palatable invasive plants. Soil compaction and denuded soils are widespread across  
the landscape and there are sheared streambanks along many miles of both the Gila  
and San Francisco Rivers. Browse pressure by cattle is causing the full suppression



1 of woody generation along miles of waterways and preventing the restoration of  
2 critical habitat.”

3 58. In 2018, the Center conducted a similar assessment to determine if cattle  
4 are present on riparian areas that are purportedly excluded from cattle on 20 allotments in  
5 the Apache-Sitgreaves National Forest. In total, the Center surveyed riparian areas along  
6 101.1 stream miles on the Blue and San Francisco Rivers and portions of major  
7 tributaries including East Eagle Creek. Observations of cattle impacts were collected for  
8 159 distinct riparian segments, each ¼ to 1 mile in length.

9 59. Like the Gila National Forest Assessment, in conducting the Apache-  
10 Sitgreaves Assessment, field surveyors recorded livestock grazing impacts to riparian  
11 vegetation, soils, and streambanks, and documented the condition of enclosure fencing.  
12 Data were collected in six categories and were scored based on the severity and  
13 frequency of impacts. Stream reaches were ranked with absent, light, moderate, or  
14 significant grazing impacts. All data is supported by hundreds of georeferenced  
15 photographs documenting livestock presence and their impacts.

16 60. These assessments documented that the purported fencing exclusions were  
17 frequently in disrepair or simply nonexistent, resulting in widespread unauthorized cattle  
18 presence with associated damage to riparian areas and occupied or suitable endangered  
19 species habitat.). More than 40% of stream miles were ranked with significant impacts  
20 (41 miles), while an additional 15.4% of stream miles showed moderate impacts (15.6  
21 miles), and 16.8% had light impacts (17 miles). Only 27.3% of surveyed areas were  
22 absent of cattle impacts (27.7 miles). In numerous instances, surveyors observed cattle  
23 directly present in riparian and streamside areas.

24 61. The Center compiled these survey results into a detailed report in December  
25 2018 and provided this report to USFS. USFS has not taken adequate corrective action in  
26 response.

27 62. As stated in the survey’s summary:  
28

1 “Cattle signs were recent in over half the allotments and cattle were seen and  
 2 documented in restricted riparian areas in 11 out of the 20 allotments. In almost  
 3 half of all riparian areas surveyed, there is intense pressure on native grasses  
 4 resulting in their replacement with non-palatable invasive plants. Soil compaction  
 5 and denuded soils are widespread across these impacted landscapes and trampled  
 6 streambanks are common. Browsing pressure by cattle is suppressing woody plant  
 7 regeneration along the majority of surveyed waterways, thus preventing the natural  
 8 renewal of critical wildlife habitats and threatening the recovery of listed species.  
 9 By far the most severely impacted streams are on the Clifton Ranger District,  
 10 especially the Blue and San Francisco Rivers and Eagle Creek.”

11 63. In the spring of 2019, the Center conducted additional surveys on 30 Gila  
 12 National Forest allotments, including the allotments surveyed in 2017, documenting  
 13 continued extensive damage and recent cattle impacts on those allotments.

14 64. In total, the Center surveyed riparian areas along 134 stream miles in the  
 15 spring 2019 surveys. These assessments again documented that the purported fencing  
 16 exclusions were frequently in disrepair or simply nonexistent, resulting in widespread  
 17 unauthorized cattle presence with associated damage to riparian areas and occupied or  
 18 suitable endangered species habitat.). The 2019 Gila National Forest Assessment in fact  
 19 documented even worse impacts—83% of surveyed riparian areas contained significant  
 20 cattle impacts.

21 65. The Center compiled these survey results into a detailed report in January  
 22 2020 and provided this report to USFS. USFS has not taken adequate corrective action in  
 23 response.

24 **E. The Challenged USFS Grazing Authorizations Rely Upon Exclusion of**  
 25 **Cows from Southwestern Streams and Consistent Monitoring of Such**  
 26 **Exclusions as a Basis for Endangered Species Act Compliance**

27 66. Today, the Agencies continue to utilize an iteration of the Grazing Criteria,  
 28 now called “Master Framework for Streamlining Consultation on Livestock Grazing  
 Activities” (December 2015) (hereinafter referred to as “Grazing Criteria”). The Grazing  
 Criteria presumes that cattle have been excluded from major waterways, and that USFS  
 will conduct regular monitoring to ensure the continuing efficacy of such exclusions. *See,*  
*e.g.,* p. 68 (“Riparian areas on National Forest System lands have been excluded from

1 livestock grazing to protect habitat along the Gila, San Francisco, Tularosa River, Negrito  
 2 Creek, Verde, Blue, North Fork East Fork Black Rivers, and Campbell Blue and Eagle  
 3 Creeks”).

4 67. The Grazing Criteria provides that the Agencies can only determine that  
 5 domestic livestock grazing is not likely to adversely affect aquatic and riparian dependent  
 6 threatened and endangered species, or destroy or adversely modify their designated  
 7 critical habitat, through robust protection of streamside riparian habitats, typically  
 8 achieved through year-long exclusion of cattle. Notably, these riparian exclusions are  
 9 only one component of a not likely to adversely affect determination and the USFS must  
 10 also meet specific standards with respect to grazing in adjacent upland areas:

11 \* **Listed Fish (including Gila chub, spikedace, and loach minnow):** requiring  
 12 “yearlong exclusion of livestock from occupied ... habitats in the action area,” as  
 13 well as a determination that impacts from upland livestock grazing “are  
 14 determined to be insignificant or discountable ...” (p. 80).

15 \* **Chiricahua leopard frog:** requiring “no livestock use or livestock management  
 16 activities where the species is reasonably certain to occur or there is occupied  
 17 aquatic habitat,” as well as determinations that impacts from upland livestock  
 18 grazing are “insignificant or discountable,” and that “[p]roposed livestock  
 19 management activities ... do not increase the likelihood that non-native predators  
 20 ... will colonize or be introduced to such aquatic sites.” (p. 16).

21 \* **Southwestern willow flycatcher and yellow-billed cuckoo:** requiring that  
 22 grazing activities “do not measurably or detectably reduce the suitability or  
 23 regeneration” of riparian streamside habitat, as well as determinations that  
 24 potential indirect effects are “insignificant or discountable” (p. 31, 34).

25 \* **Narrow-headed and northern Mexican garter snake:** requiring that there  
 26 “will be no livestock use or livestock management activities where the species is  
 27 reasonably certain to occur or where there is occupied habitat,” as well as  
 28 determinations that the impacts from upland livestock grazing are “insignificant or

discountable,” with “particular attention given to potential impacts to native fish,” and that proposed livestock management activities “will not increase the likelihood that bullfrogs, non-native, spiny-rayed fish, brown trout, or crayfish will colonize, be introduced, or improve their status.” (p. 127, 132).

68. The Apache-Sitgreaves and Gila National Forest allotments listed in **Table 1** have most recently been considered in separate (though sometimes batched) section 7 consultations. In accordance with the Grazing Criteria and substantive ESA obligations to avoid jeopardizing the continued existence of listed species, or destroy or adversely modify designated critical habitat, these consultations have relied upon USFS commitments to exclude livestock from riparian areas, ensured through consistent USFS monitoring, to justify conclusions of no effect or not likely to adversely affect determinations in relation to aquatic or riparian dependent endangered species.

#### **Apache National Forest Allotments (Overview)**

69. The 14 Apache National Forest allotments at issue in this suit were considered together in separate section 7 consultations. Several of these consultations involved “likely to adversely affect” findings, and thus concluded with a Biological Opinion issued by FWS. Others were informal and concluded with FWS concurrences on not likely to adversely affect findings documented in USFS Biological Assessments. Unlike the Gila National Forest, grazing consultations for the Apache-Sitgreaves National Forests have not clearly relied on the Guidance Criteria for determining effects to listed species.

#### **Apache National Forest Allotments (Blue River)**

70. The Blue River’s headwaters start in New Mexico and flow for approximately fifty miles through Arizona into its confluence with the San Francisco River. This undammed, remote stream is fed by numerous tributaries, many of which are also occupied by endangered species. The Blue River runs almost entirely within the Apache National Forest, and is surrounded by the 200,000-acre Blue Range Primitive Area, which is managed the same as a congressionally designated wilderness. Although

1 several native fish species have been extirpated, the Blue River harbors one of the highest  
2 diversity of native fishes in Arizona.

3 71. On February 2, 2017, FWS issued a Biological Opinion concluding section  
4 7 consultation for the reissuance of a ten-year grazing permit for the **Wildbunch**  
5 **allotment**. The San Francisco and Blue Rivers form the western and southern boundary  
6 of the allotment, respectively, which also contains additional perennial tributaries to the  
7 Blue River including Johnson, Cienega, and Indian Creeks. These waters and tributaries  
8 contain designated critical habitat for the southwestern willow flycatcher, loach minnow,  
9 and spikedace, and proposed critical habitat for the yellow-billed cuckoo and narrow-  
10 headed garter snake. FWS concluded that continued grazing would not jeopardize the  
11 continued existence of the loach minnow and spikedace, and was not likely to adversely  
12 affect the yellow-billed cuckoo and narrow-headed garter snake, based on the USFS  
13 commitment that it “shall protect the riverine and riparian habitat from significant  
14 livestock grazing and effects from livestock crossing of the Blue River.” (p. 16).

15 72. The Center’s A-S Grazing Assessment found 0.9 miles of moderate cattle  
16 impacts and 4.8 miles of significant cattle impacts on the Blue River within the  
17 **Wildbunch allotment**, including heavy cattle trailing and resultant erosion and shearing  
18 of streambanks, no functional fencing, and numerous cattle in the river.

19 73. These findings contradict the Agencies’ commitment in their ESA section 7  
20 consultation to exclude cattle from the Blue River, San Francisco River, and other  
21 riparian areas on this allotment and demonstrate that USFS has not been conducting  
22 required monitoring or taken required corrective action.

23 74. The USFS October 17, 2019 NOI response letter acknowledges  
24 “compliance issues” with the **Wildbunch allotment** but does not commit to reinitiation  
25 of consultation, and USFS is not ensuring that cattle are removed from riparian areas.

26 75. On January 31, 2003, FWS issued a Biological Opinion addressing multiple  
27 grazing allotments along the Blue and San Francisco Rivers, including the **Pigeon**  
28 **allotment**, which contains portions of the Blue River (which primarily flows just outside

1 its boundaries within the Wildbunch allotment) along its northeastern and southeastern  
2 boundary, and is occupied by loach minnow and Chiricahua leopard frog. FWS  
3 concluded that continued grazing would not jeopardize the continued existence of these  
4 species based on the exclusion of seven miles of riparian habitat from grazing (p. 92).

5 76. The Center's A-S Grazing Assessment found 0.6 miles of significant cattle  
6 impacts on the Blue River within the **Pigeon allotment**, including heavy cattle trailing  
7 and resultant erosion and shearing of streambanks, no functional fencing, and numerous  
8 cattle in the river.

9 77. These findings contradict the Agencies' commitment in their ESA section 7  
10 consultation to exclude cattle from the Blue River on this allotment and demonstrate that  
11 USFS has not been conducting required monitoring or taken required corrective action.

12 78. The USFS October 17, 2019 NOI response letter acknowledges  
13 "compliance issues" with the **Pigeon allotment**, and states that the allotment is "currently  
14 in consultation with the FWS or will be initiated by the end of the calendar year and  
15 completed in Fiscal Year 2020," but USFS is not ensuring that cattle are removed from  
16 riparian areas pending completion of this consultation.

17 79. On January 31, 2003, FWS issued a Biological Opinion addressing grazing  
18 allotments within the Blue and San Francisco River watersheds, including the **Sandrock**  
19 **allotment**. The Sandrock allotment includes an extensive sixteen-mile reach of the Blue  
20 River containing designated critical habitat for the loach minnow and spikedace and  
21 proposed critical habitat for the yellow-billed cuckoo and narrow-headed garter snake.  
22 FWS stated that "grazing was suspended on the Sandrock Allotment in 1984 due to  
23 concerns over watershed conditions." (p. 105).

24 80. The Center's A-S Grazing Assessment found 8.2 miles of moderate cattle  
25 impacts and 7.8 miles of significant cattle impacts on the Blue River within the  
26 purportedly retired **Sandrock allotment**, including abundant cattle trails and sign,  
27 trampled streamside herbaceous vegetation, and diminished streamside vegetative cover.  
28

1           81.     These findings contradict the Agencies’ commitment in their ESA section 7  
2 consultation to exclude cattle from the Blue River on this allotment, as well as the  
3 USFS’s characterization of this allotment as retired, and demonstrate that USFS has not  
4 been conducting required monitoring or taken required corrective action.

5           82.     On August 28, 2015, FWS issued a concurrence on USFS Biological  
6 Assessments concluding section 7 consultations for the renewal of ten-year grazing  
7 permits and associated issuance of AMPs for four allotments including the **Raspberry**  
8 **allotment**. The Raspberry allotment includes designated critical habitat for loach minnow  
9 and proposed critical habitat for the narrow-headed garter snake, as well as additional  
10 perennial riparian habitat along Strayhorse and Raspberry Creeks. The allotment also  
11 contains KP Creek, which is occupied by Apache trout. Although USFS had initially  
12 determined that continued grazing was likely to adversely affect these species, “[u]pon  
13 further review and discussion with [USFS] staff,” FWS instead made a not likely to  
14 adversely affect finding. (p. 2). This finding was based on a commitment to exclude  
15 cattle from the Blue River. (p. 9.). The Raspberry allotment had been in non-use since  
16 2002.

17           83.     The Center’s A-S Grazing Assessment found 0.5 miles of moderate cattle  
18 impacts and 5.6 miles of significant cattle impacts on the Blue River within the  
19 **Raspberry allotment**, including the trampling of several seeps and springs, shearing and  
20 erosion of streambanks, and downed fencing.

21           84.     These findings contradict the Agencies’ commitment in their ESA section 7  
22 consultation to exclude cattle from the Blue River and other riparian areas on this  
23 allotment and demonstrate that USFS has not been conducting required monitoring or  
24 taken required corrective action.

25           85.     On December 10, 2015 FWS issued a concurrence with a USFS Biological  
26 Assessment concluding ESA section 7 consultations for the renewal of ten-year grazing  
27 permits and associated issuance of AMPs for eight allotments including the **Cow Flat**,  
28 **Fishhook-Steeple Mesa**, and **Red Hill allotments**. The portion of the Blue River



1 flowing through these allotments contains designated critical habitat for loach minnow  
2 and spikedace and proposed critical habitat for the narrow-headed garter snake. FWS  
3 concluded that the grazing on these allotments will not adversely affect loach minnow or  
4 spikedace based on the repeatedly stated commitment to exclude the Blue River from  
5 cattle grazing.

6 86. The Center's A-S Grazing Assessment found the following with respect to  
7 these allotments:

8 \* 0.6 miles of significant cattle impacts on the Blue River within the **Cow Flat**  
9 **allotment**, including bare, denuded ground, sheared and trampled banks from consistent  
10 cattle trailing, and cattle feces evident in the water;

11 \* 0.8 miles of moderate cattle impacts and two miles of significant cattle impacts  
12 on the Blue River within the **Fishhook-Steeple Mesa allotment**, including cattle entering  
13 riparian areas from the road, fresh cattle feces and tracks at water's edge, and bare  
14 denuded ground; and

15 \* 0.7 miles of significant cattle impacts on the Blue River within the **Red Hill**  
16 **allotment**, including cows seen in river and throughout public use area, severe trampling  
17 of streambanks from intensive grazing, and heavy contamination of surface water by cow  
18 feces.

19 87. These findings contradict the Agencies' commitment in their ESA section 7  
20 consultation to exclude cattle from the Blue River on these allotments and demonstrate  
21 that USFS has not been conducting required monitoring or taken required corrective  
22 action.

23 **Apache National Forest Allotments (Eagle Creek)**

24 88. With headwaters originating in high-elevation mixed-conifer forests along  
25 the southern slope of Arizona's White Mountains, Eagle Creek is an eighty-three mile  
26 long tributary to the Gila River. After passing through a broad, grassy valley into deep,  
27 steep-walled canyons, the lower portions flow through desert grasslands and desert before  
28

1 meeting with the Gila River. Eagle Creek retains more native fish than any other stream  
2 in the Gila River basin.

3 89. On February 26, 2002, FWS issued an Eagle Creek Watershed Biological  
4 Opinion addressing the **East Eagle, Mud Springs, Double Circle, Tule, and Dark**  
5 **Canyon allotments**. Among other findings, FWS concluded that the continued grazing  
6 authorized by USFS would not jeopardize the continued existence of loach minnow and  
7 spikedace because “[t]he Forest has implemented fencing around the riparian corridor”  
8 and USFS also pledged “to take action to ensure that range condition does not  
9 deteriorate” on upland areas and “to improve range condition in areas of fair or poor  
10 condition.” (p. 52). In addition, FWS directed that USFS “shall prevent overuse of  
11 riparian areas by livestock” by performing “random checks of fencing on Eagle Creek to  
12 ensure that trespass cattle are not using these areas.” (p. 57). The Biological Opinion did  
13 not address the Gila chub and narrow-headed garter snake, both of which are present on  
14 Eagle Creek but were not yet listed at that time.

15 90. The Center’s A-S Grazing Assessment found:

16 \* 0.8 miles of moderate cattle impacts and 1.2 miles of significant cattle impacts  
17 on Eagle Creek within the **East Eagle allotment**, as well as moderate to severe impacts  
18 on the riparian habitat of East Eagle Creek. The East Eagle allotment includes designated  
19 critical habitat for Gila chub, spikedace, and loach minnow, and proposed critical habitat  
20 for the narrow-headed garter snake, as well as occupied Apache trout habitat within  
21 Chitty Creek;

22 \* 0.2 of moderate cattle impacts and 1.1 miles of significant impacts on Eagle  
23 Creek within the **Mud Springs allotment**, including large swaths of heavily grazed  
24 grasses within the floodplain, severely compromised streambanks, and heavy browsing of  
25 streamside woody vegetation. The Mud Springs allotment includes designated critical  
26 habitat for Gila chub, spikedace, and loach minnow, and proposed critical habitat for the  
27 narrow-headed garter snake;  
28

1           \* 2.7 miles of significant cattle impacts on Eagle Creek within the **Double Circle**  
 2 **allotment**, including intense grazing pressure on streambanks. The Double Circle  
 3 allotment includes designated critical habitat for spikedace and loach minnow, and  
 4 proposed critical habitat for the narrow-headed garter snake;

5           \* 0.9 miles of significant cattle impacts on Eagle Creek within the **Tule allotment**,  
 6 including severe trampling of streambanks and fencing in disrepair. The Tule allotment  
 7 includes designated critical habitat for spikedace and loach minnow, and proposed critical  
 8 habitat for the narrow-headed garter snake; and

9           \* 4.4 miles of significant cattle impacts on Eagle Creek within the **Dark Canyon**  
 10 **allotment**, including severe trampling of streamside vegetation, sharing of banks, heavy  
 11 near-channel browsing, and fencing in disrepair. The Dark Canyon allotment includes  
 12 designated critical habitat for spikedace and loach minnow and proposed critical habitat  
 13 for the narrow-headed garter snake.

14           91.     These findings contradict the Agencies' commitment in their ESA section 7  
 15 consultation to exclude cattle from Eagle Creek and other riparian areas on these  
 16 allotments and demonstrate that USFS has not been conducting required monitoring or  
 17 taken required corrective action.

18           92.     The USFS October 17, 2019 NOI response letter acknowledges the  
 19 presence of unauthorized cattle on the **East Eagle, Mud Springs, Double Circle, Tule,**  
 20 **and Dark Canyon allotments**, and states that some unauthorized livestock have been  
 21 removed. The NOI response also acknowledges that ESA reinitiation is required on  
 22 grazing allotments within the Eagle Creek watershed, but this consultation has not yet  
 23 resulted in a final Biological Assessment or Biological Opinion, and USFS is not  
 24 ensuring that cattle are removed from riparian areas pending completion of such  
 25 consultation.

26           **Apache National Forest Allotments (San Francisco River)**

27           93.     With headwaters originating near Alpine, Arizona, the San Francisco River  
 28 flows for nearly 100 miles through western New Mexico before reentering Arizona and

1 meeting with the Gila River south of Clifton, Arizona. This portion of the San Francisco  
2 River is occupied by loach minnow and is the site of a 2008 reintroduction for spikedace.  
3 It contains designated critical habitat for both species, as well as Gila chub, Chiricahua  
4 leopard frog, and southwestern willow flycatcher, and proposed critical habitat for the  
5 yellow-billed cuckoo and narrow-headed garter snake.

6 94. On November 30, 2001, FWS issued a Biological Opinion for the **Pleasant**  
7 **Valley allotment**, concluding that the continued grazing authorized by USFS would not  
8 jeopardize the continued existence of spikedace or loach minnow because “[n]o livestock  
9 from the Pleasant Valley allotment will be permitted to access spikedace critical habitat  
10 [along the San Francisco River].” (p. 57-58). The biological opinion did not address the  
11 Gila chub, Chiricahua leopard frog, yellow-billed cuckoo, or narrow-headed garter snake,  
12 which were listed subsequent to its preparation.

13 95. The Center’s A-S Grazing Assessment found 1.1 miles of moderate cattle  
14 impacts and 1.4 miles of significant cattle impacts on the San Francisco River within the  
15 **Pleasant Valley allotment**, including prolific cow pies, large trampled areas and  
16 wallows along the water’s edge, and numerous well-worn paths within the flood plain.

17 96. The USFS October 17, 2019 NOI response letter states that a Biological  
18 Assessment was submitted to FWS on April 29, 2019 regarding the **Pleasant Valley**  
19 **allotment**, but this consultation has not yet resulted in a final Biological Assessment or  
20 Biological Opinion, and USFS is not ensuring that cattle are removed from riparian areas  
21 pending completion of such consultation.

22 97. On May 6, 2016, FWS issued a Biological Opinion for the **Hickey**  
23 **allotment**, concluding that the continued grazing authorized by USFS would not  
24 jeopardize the continued existence of Chiricahua leopard frog, and was not likely to  
25 adversely affect yellow-billed cuckoo, southwestern willow flycatcher, narrow-headed  
26 gartersnake, loach minnow, spikedace, Gila chub, or their designated critical habitat.  
27 FWS’s conclusion was based on the purported exclusion of 12.5 miles of habitat along  
28 the San Francisco River (p. 7, 9, 11).

1           98. The Center's A-S Grazing Assessment found 2.6 miles of moderate cattle  
2 impacts and 7.2 miles of significant cattle impacts on the San Francisco River within the  
3 **Hickey allotment**, including pervasive and severe impacts to banks, water quality, and  
4 vegetation, and observations of cattle defecating directly into the stream.

5           99. The Agencies have not responded to the Center's supplemental September  
6 16, 2020 NOI regarding the Hickey allotment.

7           **Gila National Forest Allotments (Overview)**

8           100. Nearly all of the 26 Gila National Forest allotments at issue in this suit were  
9 considered together in an informal section 7 consultation on USFS Biological  
10 Assessments prepared for forty-four allotments within the forest that concluded with a  
11 July 11, 2016 FWS concurrence. The Agencies used the Master Framework Guidance  
12 Criteria for determining effects to listed species, all of which are "may affect, not likely  
13 to adversely affect." In order for these findings to remain in effect for the life of the term  
14 permits, USFS committed to conducting annual monitoring of exclosures.

15           **Gila National Forest Allotments (Tularosa River)**

16           101. The Tularosa River is a free-flowing, approximately thirty-two mile long  
17 tributary of the San Francisco River in western New Mexico. The Tularosa River is  
18 largely free of nonnative fish and contains loach minnow and Chiricahua leopard frog  
19 critical habitat, as well as one of few remaining currently viable populations of narrow-  
20 headed garter snakes.

21           102. The July 11, 2016 FWS concurrence concluding section 7 consultation  
22 included USFS Biological Assessments for the renewal of ten-year grazing permits and  
23 associated issuance of AMPs for allotments which include the Tularosa River or its  
24 tributaries within their boundaries including the **Corner Mountain, Negrito/Yeguas,**  
25 **Eagle Peak, Govina, West Sand Flat, Alexander, Deep Canyon, and Lower Canyon**  
26 **allotments**. In conformance with the Grazing Criteria, all of these Biological  
27 Assessments committed USFS to the exclusion of cattle from the Tularosa River and its  
28

1 tributaries in order to issue not likely to adversely affect findings for impacted species  
2 and critical habitat.

3 103. The **Corner Mountain allotment** includes approximately 5.3 miles of  
4 South Fork Negrito Creek, a tributary of the Tularosa River containing proposed critical  
5 habitat for the narrow-headed garter snake.

6 104. Under the Grazing Criteria, a not likely to adversely affect finding for the  
7 narrow-headed garter snake requires that there “will be no livestock use or livestock  
8 management activities” where the species is reasonably certain to occur.

9 105. The USFS Biological Assessment states that the Corner Mountain  
10 allotment term grazing permit was relinquished in 1992 but that the allotment is  
11 sometimes used as a swing or support allotment on an as-needed basis. USFS states that  
12 unauthorized livestock use has occurred but that “corrective actions taken by the District  
13 have kept livestock utilization of forage and riparian vegetation to a minimum.”

14 106. The Gila Grazing Assessment found 2.4 miles of moderate cattle impacts  
15 on South Fork Negrito Creek within the Corner Mountain allotment, including long  
16 stretches of streambanks impacted by wallowing, creating dusty and barren terraces,  
17 heavy grazing of riparian grasses, and overall severe and sustained cattle impacts on the  
18 river corridor, contradicting the Agencies’ commitment to exclude cattle.

19 107. The **Negrito/Yeguas allotment** includes approximately 3.5 miles of South  
20 Fork Negrito Creek, a tributary of the Tularosa River occupied by the narrow-headed  
21 garter snake, and containing proposed critical habitat for the species, as well as three  
22 miles of North Fork Negrito Creek and 3.5 miles of Negrito Creek.

23 108. Under the Grazing Criteria, a not likely to adversely affect finding for the  
24 narrow-headed garter snake requires that there “will be no livestock use or livestock  
25 management activities” where the species is reasonably certain to occur.

26 109. The USFS Biological Assessment states that the South Fork Negrito Creek  
27 “runs through the middle of the allotment and is excluded.”  
28

1           110. The Center’s Gila Grazing Assessment found 4.3 miles of significant cattle  
2 impacts on South Fork Negrito Creek within the **Negrito-Yeguas allotment**, including  
3 extreme, severe, and pervasive negative impacts that exceeded the scale for the survey,  
4 soil compaction, severe and extensive bank degradation, and creation of a potentially  
5 unlawful diversion ditch, contradicting the Agencies’ commitment to exclude cattle.

6           111. The **Govina and Sand Flat allotments** include approximately one mile of  
7 the Tularosa River (on opposing sides of the river) containing designated critical habitat  
8 for the Chiricahua leopard frog and proposed critical habitat for the narrow-headed garter  
9 snake.

10          112. Under the Grazing Criteria, a not likely to adversely affect finding for both  
11 the Chiricahua leopard frog and the narrow-headed garter snake requires that there “will  
12 be no livestock use or livestock management activities” where the species is reasonably  
13 certain to occur or there is occupied aquatic habitat, or within critical habitat.

14          113. The USFS Biological Assessment states that the Tularosa River is excluded  
15 on NFS lands except for a water access point at an existing road crossing.

16          114. The Center’s Gila Grazing Assessment found 0.5 miles of significant cattle  
17 impacts on the Tularosa River within the **Govina and West Sand Flat allotments**,  
18 including severe impacts from cattle trails, trampling, and shearing of the riverbank,  
19 contradicting the Agencies’ commitment to exclude cattle.

20          115. The **Alexander allotment** includes approximately 1.5 miles of the Tularosa  
21 River containing designated critical habitat for the loach minnow and Chiricahua leopard  
22 frog and proposed critical habitat for the narrow-headed garter snake.

23          116. Under the Grazing Criteria, a not likely to adversely affect finding for the  
24 loach minnow, Chiricahua leopard frog, and narrow-headed garter snake requires that  
25 there “will be no livestock use or livestock management activities” where the species is  
26 reasonably certain to occur or there is occupied aquatic habitat, or within critical habitat.



1           117. The USFS Biological Assessment states that the Tularosa River runs  
2 through portions of the western side of the Alexander allotment, but that the river is  
3 excluded from livestock grazing through riparian exclosure fencing.

4           118. The Center's Gila Grazing Assessment found 1.1 miles of significant cattle  
5 impacts on the Tularosa River within the **Alexander allotment**, including complete  
6 degradation, trampling, and shearing of streambanks, and downed fences, contradicting  
7 the Agencies' commitment to exclude cattle.

8           119. The **Deep Canyon allotment** includes approximately 3.2 miles of the  
9 Tularosa River containing designated critical habitat for the loach minnow and  
10 Chiricahua leopard frog and proposed critical habitat for the narrow-headed garter snake.

11           120. Under the Grazing Criteria, a not likely to adversely affect finding for the  
12 loach minnow, Chiricahua leopard frog, and narrow-headed garter snake requires that  
13 there "will be no livestock use or livestock management activities" where the species is  
14 reasonably certain to occur or there is occupied aquatic habitat, or within critical habitat.

15           121. The USFS Biological Assessment states that the Tularosa River runs  
16 through portions of the western side of the Deep Canyon allotment, but that the river is  
17 excluded from livestock grazing through riparian exclosure fencing.

18           122. The Center's Gila Grazing Assessment found two miles of significant cattle  
19 impacts on the Tularosa River within the **Deep Canyon allotment**, including trailing  
20 corridors and severe trampling, soils converted to dust, and little to no woody  
21 regeneration, contradicting the Agencies' commitment to exclude cattle.

22           123. The **Lower Plaza allotment** includes approximately 0.3 miles of the  
23 Tularosa River, as well as a small portion of San Francisco River, containing designated  
24 critical habitat for the loach minnow and proposed critical habitat for the narrow-headed  
25 garter snake.

26           124. Under the Grazing Criteria, a not likely to adversely affect finding for the  
27 loach minnow and narrow-headed garter snake requires that there "will be no livestock  
28

1 use or livestock management activities” where the species is reasonably certain to occur  
2 or there is occupied aquatic habitat, or within critical habitat.

3 125. The USFS Biological Assessment states that the Tularosa River and San  
4 Francisco River are excluded from livestock grazing on the Lower Plaza allotment  
5 through riparian exclosure fencing.

6 126. The Center’s Gila Grazing Assessment found 0.5 miles of significant cattle  
7 impacts on the Tularosa River within the **Lower Plaza allotment**, including severe  
8 browsing, trampling, and trailing creating wallows and bare soil, contradicting the  
9 Agencies’ commitment to exclude cattle.

10 127. These findings contradict the Agencies’ commitment in their ESA section 7  
11 consultation to exclude cattle from the Tularosa River and other riparian areas on the  
12 **Corner Mountain, Negrito/Yeguas, Eagle Peak, Govina, West Sand Flat, Alexander,**  
13 **Deep Canyon, and Lower Plaza allotments**, and demonstrate that USFS has not been  
14 conducting required monitoring or taken required corrective action.

15 128. The USFS October 17, 2019 NOI response letter acknowledges compliance  
16 issues on the **Alexander and Deep Canyon allotments**, stating that an “adjacent  
17 landowner’s unauthorized livestock were present” on each of the allotments and that  
18 some fencing was repaired, but does not state any intention to reinitiate or complete  
19 consultation to address the extensive and severe riparian damage documented by the  
20 Center’s assessment. The Agencies have not responded to the Center’s September 16,  
21 2020 supplemental NOI regarding the **Eagle Peak and West Sand Flat allotments**.

22 **Gila National Forest Allotments (San Francisco River)**

23 129. The San Francisco River flows for approximately 100 miles in a general  
24 southerly direction through western New Mexico before turning westward and reentering  
25 Arizona. The New Mexico stretch of the San Francisco River contains occupied and  
26 designated critical habitat for yellow-billed cuckoo, southwestern willow flycatcher,  
27 loach minnow, spikedace, and narrow-headed garter snake.  
28

1           130. The July 11, 2016 FWS concurrence concluding section 7 consultation  
2 included USFS Biological Assessments for the renewal of ten-year grazing permits and  
3 associated issuance of AMPs for allotments containing the San Francisco River or its  
4 tributaries within their boundaries including the **Luna, Black Bob** (this allotment has  
5 subsequently been divided into the **Cienega and Henley allotments**), **Frisco Plaza,**  
6 **Kelly, Devil's Park, Alma, Citizen, Roberts Park, Harve Gulch, Bighorn, and Dry**  
7 **Creek allotments**. In conformance with the Grazing Criteria, all of these Biological  
8 Assessments committed USFS to the exclusion of cattle from the San Francisco River  
9 and tributaries containing endangered species habitat in order to issue not likely to  
10 adversely affect findings for impacted species and critical habitat.

11           131. The **Luna allotment** includes approximately four miles of the San  
12 Francisco River containing designated critical habitat for the southwestern willow  
13 flycatcher and proposed critical habitat for the narrow-headed garter snake, as well as  
14 four miles of Dry Blue Creek, two miles of Frieborn Creek, and one mile of Pace Creek  
15 containing designated critical habitat for the spikedace and loach minnow.

16           132. Under the Grazing Criteria, a not likely to adversely affect finding for the  
17 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no  
18 livestock use or livestock management activities” where the species is reasonably certain  
19 to occur.

20           133. The USFS Biological Assessment states that livestock are excluded from  
21 four miles of the San Francisco River, four miles of Dry Blue Creek, two miles of  
22 Frieborn Creek, and one mile of Pace Creek on the Luna allotment

23           134. The Center's Gila Grazing Assessment found 0.8 miles of moderate cattle  
24 impacts and three miles of significant cattle impacts on the riparian areas of the **Luna**  
25 **allotment**, including heavy grazing along the San Francisco River streambank, severe  
26 and pervasive cattle trails, and cattle observed in the San Francisco River, contradicting  
27 the Agencies' commitment to exclude cattle from the San Francisco River and other  
28 riparian areas within the Luna allotment.

1           135. The **Black Bob allotment** includes approximately 5.4 miles of the San  
2 Francisco River containing designated critical habitat for the loach minnow and proposed  
3 critical habitat for the narrow-headed garter snake, as well as three miles of Cienega  
4 Creek. The Black Bob allotment has subsequently been terminated, and divided into the  
5 **Cienega and Henley allotments**.

6           136. Under the Grazing Criteria, a not likely to adversely affect finding for the  
7 narrow-headed garter snake and loach minnow requires that there “will be no livestock  
8 use or livestock management activities” where the species is reasonably certain to occur.

9           137. The USFS Biological Assessment states that livestock are excluded from  
10 the San Francisco River on the Black Bob allotment, with the exception of “livestock  
11 water access points.”

12           138. The Center’s Gila Grazing Assessment found 3.5 miles of significant cattle  
13 impacts on the San Francisco River within the **Black Bob allotment**, including trampling  
14 causing compaction along the water’s edge with sheared banks, and areas of wallowing  
15 and bare ground, contradicting the Agencies’ commitment to exclude cattle from the San  
16 Francisco River and other riparian areas within the Black Bob allotment.

17           139. The **Frisco Plaza allotment** includes approximately five miles of the San  
18 Francisco River containing designated critical habitat for the loach minnow and  
19 spikedace and proposed critical habitat for the narrow-headed garter snake, as well as  
20 0.75 miles of the Tularosa River containing designated critical habitat for the loach  
21 minnow and proposed critical habitat for the narrow-headed garter snake.

22           140. Under the Grazing Criteria, a not likely to adversely affect finding for the  
23 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no  
24 livestock use or livestock management activities” where the species is reasonably certain  
25 to occur.

26           141. The USFS Biological Assessment states that livestock are excluded from  
27 the San Francisco River and Tularosa River on the Frisco Plaza allotment except at  
28 “livestock water access points.”

1           142. The Center's Gila Grazing Assessment found 6.9 miles of significant cattle  
2 impacts on the San Francisco River within the **Frisco Plaza allotment**, including an  
3 almost complete loss of riparian edge vegetation, complete suppression of woody  
4 vegetation, severe bank shearing and degradation, low plant diversity, and multiple points  
5 of extreme bank erosion at the river's edge, contradicting the Agencies' commitment to  
6 exclude cattle from the San Francisco River and Tularosa River within the Frisco Plaza  
7 allotment.

8           143. The **Kelly allotment** includes approximately ten miles of the San Francisco  
9 River containing designated critical habitat for the loach minnow and spikedace and  
10 proposed critical habitat for the narrow-headed garter snake, as well as four miles of Saliz  
11 Creek with proposed critical habitat for the narrow-headed garter snake.

12           144. Under the Grazing Criteria, a not likely to adversely affect finding for the  
13 narrow-headed garter snake, loach minnow, and spikedace requires that there "will be no  
14 livestock use or livestock management activities" where the species is reasonably certain  
15 to occur.

16           145. The USFS Biological Assessment states that livestock are excluded from  
17 the San Francisco River on the Kelly allotment except for four livestock water access  
18 points

19           146. The Center's Gila Grazing Assessment found 1.1 miles of moderate cattle  
20 impacts and 4.9 miles of significant cattle impacts on the San Francisco River within the  
21 **Kelly allotment**, including riverbanks denuded of vegetation, frequent and severe  
22 streambank shearing and compaction, and heavily trampled river banks, contradicting the  
23 Agencies' commitment to exclude cattle from the San Francisco River and other riparian  
24 areas within the Kelly allotment.

25           147. The **Devils Park allotment** includes approximately 3.8 miles of the San  
26 Francisco River containing designated critical habitat for the loach minnow and  
27 spikedace and proposed critical habitat for the narrow-headed garter snake.  
28

1           148. Under the Grazing Criteria, a not likely to adversely affect finding for the  
2 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no  
3 livestock use or livestock management activities” where the species is reasonably certain  
4 to occur.

5           149. The USFS Biological Assessment states that livestock are excluded from  
6 the San Francisco River on the Devils Park allotment except at four livestock water  
7 access points.

8           150. The Center’s Gila Grazing Assessment found 3.1 miles of significant cattle  
9 impacts on the San Francisco River within the **Devils Park allotment**, including  
10 numerous cattle observed wallowing in the river, with severe, pervasive, and sustained  
11 impacts, heavy browsing of woody regeneration, and near-stream sand terraces denuded  
12 of vegetation, contradicting the Agencies’ commitment to exclude cattle from the San  
13 Francisco River within the Devils Park allotment.

14           151. The **Alma allotment** includes approximately 3.8 miles of the San Francisco  
15 River containing designated critical habitat for the southwestern willow flycatcher, loach  
16 minnow, and spikedace and proposed critical habitat for the yellow-billed cuckoo and  
17 narrow-headed garter snake.

18           152. Under the Grazing Criteria, a not likely to adversely affect finding for the  
19 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no  
20 livestock use or livestock management activities” where the species is reasonably certain  
21 to occur, and for the yellow-billed cuckoo, the grazing cannot “measurably or detectably  
22 reduce the suitability or regeneration of” cuckoo streamside habitat.

23           153. The USFS Biological Assessment states that livestock are excluded from  
24 the San Francisco River on the Alma allotment except for a “less than 100 foot long”  
25 livestock water access point.

26           154. The Gila Grazing Assessment found 2.7 miles of significant cattle impacts  
27 on the San Francisco River within the **Alma allotment**, including abundant cattle sign  
28 and heavy utilization of riparian exclosure areas, missing fence lines, well-worn cattle

1 trails, including wide trails indicating herd movement, sheared streambanks with deep  
2 hoof depressions, abundant wallowing areas with soils completely denuded of vegetation,  
3 and trampling of saplings, contradicting the Agencies' commitment to exclude cattle  
4 from the San Francisco River within the Alma allotment.

5 155. The **Roberts Park allotment** includes approximately 4.6 miles of the San  
6 Francisco River containing designated critical habitat for the southwestern willow  
7 flycatcher, loach minnow, and spokedace and proposed critical habitat for the yellow-  
8 billed cuckoo and narrow-headed garter snake.

9 156. Under the Grazing Criteria, a not likely to adversely affect finding for the  
10 narrow-headed garter snake, loach minnow, and spokedace requires that there "will be no  
11 livestock use or livestock management activities" where the species is reasonably certain  
12 to occur, and for the yellow-billed cuckoo, the grazing cannot "measurably or detectably  
13 reduce the suitability or regeneration of" cuckoo streamside habitat.

14 157. The April 8, 2016 USFS Biological Assessment states that livestock are  
15 excluded from the San Francisco River on the Roberts Park allotment.

16 158. The Center's Gila Grazing Assessment found 0.4 miles of moderate cattle  
17 impacts and 1.7 miles of significant cattle impacts on the San Francisco River within the  
18 adjoining **Roberts Park and Citizen allotments**, including fencing in disrepair, cattle  
19 moving into and down the river corridor, and severe impacts with wallowing areas and  
20 large grazed patches, contradicting the Agencies' commitment to exclude cattle from the  
21 San Francisco River within the Roberts Park and Citizen allotments.

22 159. The **Citizen allotment** includes approximately 2.4 miles of the San  
23 Francisco River containing designated critical habitat for the southwestern willow  
24 flycatcher, loach minnow, and spokedace and proposed critical habitat for the yellow-  
25 billed cuckoo and narrow-headed garter snake.

26 160. Under the Grazing Criteria, a not likely to adversely affect finding for the  
27 narrow-headed garter snake, loach minnow, and spokedace requires that there "will be no  
28 livestock use or livestock management activities" where the species is reasonably certain



1 to occur, and for the yellow-billed cuckoo, the grazing cannot “measurably or detectably  
2 reduce the suitability or regeneration of” cuckoo streamside habitat.

3 161. The USFS Biological Assessment states that livestock are excluded from  
4 the San Francisco River on the Citizen allotment.

5 162. The Center’s Gila Grazing Assessment found 0.4 miles of moderate cattle  
6 impacts and 1.7 miles of significant cattle impacts on the San Francisco River within the  
7 adjoining **Roberts and Citizen allotments**, including fencing in disrepair, cattle moving  
8 into and down the river corridor, and severe impacts with wallowing areas and large  
9 grazed patches, contradicting the Agencies’ commitment to exclude cattle from the San  
10 Francisco River within the Roberts Park and Citizen allotments.

11 163. The **Harve Gulch and Bighorn allotments** include approximately 6.5  
12 miles of the San Francisco River (on opposing sides of the river) containing designated  
13 critical habitat for the southwestern willow flycatcher, loach minnow, and spokedace and  
14 proposed critical habitat for the yellow-billed cuckoo and narrow-headed garter snake, as  
15 well as 2.5 miles of Whitewater Creek containing designated critical habitat for the  
16 southwestern willow flycatcher and loach minnow and proposed critical habitat for the  
17 yellow-billed cuckoo and narrow-headed garter snake.

18 164. Under the Grazing Criteria, a not likely to adversely affect finding for the  
19 narrow-headed garter snake, loach minnow, and spokedace requires that there “will be no  
20 livestock use or livestock management activities” where the species is reasonably certain  
21 to occur, and for the yellow-billed cuckoo, the grazing cannot “measurably or detectably  
22 reduce the suitability or regeneration of” cuckoo streamside habitat.

23 165. The USFS Biological Assessment states that livestock are fully excluded  
24 from the San Francisco River and Whitewater Creek on the Harve Gulch and Bighorn  
25 allotments.

26 166. The Center’s Gila Grazing Assessment found 2.2 miles of moderate cattle  
27 impacts and 1.5 miles of significant cattle impacts on the San Francisco River within the  
28 **Harve Gulch and Bighorn allotments**, including cattle trails and wallowing areas, and

1 stunted willow recruitment, contradicting the Agencies' commitment to exclude cattle  
2 from the San Francisco River and other riparian areas within the Harve Gulch and  
3 Bighorn allotments.

4 167. The **Dry Creek allotment** includes approximately 2.5 miles of the San  
5 Francisco River containing designated critical habitat for the southwestern willow  
6 flycatcher, loach minnow, and spokedace and proposed critical habitat for the yellow-  
7 billed cuckoo and narrow-headed garter snake.

8 168. Under the Grazing Criteria, a not likely to adversely affect finding for the  
9 narrow-headed garter snake, loach minnow, and spokedace requires that there "will be no  
10 livestock use or livestock management activities" where the species is reasonably certain  
11 to occur, and for the yellow-billed cuckoo, the grazing cannot "measurably or detectably  
12 reduce the suitability or regeneration of" cuckoo streamside habitat.

13 169. The USFS Biological Assessment states that livestock are fully excluded  
14 from the San Francisco River on the Dry Creek allotment.

15 170. The Center's Gila Grazing Assessment found 0.9 miles of significant cattle  
16 impacts on the San Francisco River within the **Dry Creek allotment**, including observed  
17 cattle in riparian vegetation, large wallowing areas, and cattle tracks, contradicting the  
18 Agencies' commitment to exclude cattle from the San Francisco River within the Dry  
19 Creek allotment.

20 171. These findings contradict the Agencies' commitment in their ESA section 7  
21 consultation to exclude cattle from the San Francisco River and other riparian areas on  
22 the **Luna, Black Bob, Frisco Plaza, Kelly, Devil's Park, Alma, Citizen, Roberts Park,**  
23 **Harve Gulch, Bighorn, and Dry Creek allotments**, and demonstrate that USFS has not  
24 been conducting required monitoring or taken required corrective action.

25 172. The USFS October 17, 2019 NOI response letter acknowledges compliance  
26 issues on the **Luna, Black Bob, Kelly, Devil's Park, and Alma allotments**, stating that  
27 unauthorized cattle have been removed, but with the exception of the **Luna allotment**,  
28 does not state any intention to reinitiate or complete consultation to address the extensive

1 and severe riparian damage documented by the Center's assessment. With respect to the  
 2 **Luna allotment**, the response letter states that USFS will reinitiate consultation in Fiscal  
 3 Year 2020 to address newly listed species including narrow-headed garter snakes, but this  
 4 consultation has not yet resulted in a final Biological Assessment or Biological Opinion,  
 5 and USFS is not ensuring that cattle are removed from riparian areas pending completion  
 6 of such consultation, despite its acknowledgment that unauthorized cattle have accessed  
 7 occupied endangered species habitat on Dry Blue Creek, and that grazing is not  
 8 completely excluded from occupied endangered species habitat on the San Francisco  
 9 River.

#### 10 **Gila National Forest Allotments (Gila River Headwaters)**

11 173. The headwaters of the Gila River flow largely through the nation's first  
 12 designated wilderness, the Gila Wilderness. Collectively, the West Fork, Middle Fork,  
 13 and East Fork headwaters of the Gila River contain occupied habitat and/or designated  
 14 critical habitat for endangered species including loach minnow, spokedace, Chiricahua  
 15 leopard frog, and narrow-headed garter snake.

16 174. The July 11, 2016 FWS concurrence concluding section 7 consultation  
 17 included USFS Biological Assessments for the renewal of ten-year grazing permits and  
 18 associated issuance of AMPs for allotments containing headwater streams of the Gila  
 19 River within their boundaries including the **Jordan Mesa, Taylor Creek, and XSX**  
 20 **allotments**. In conformance with the Grazing Criteria, all of these Biological  
 21 Assessments committed USFS to the exclusion of cattle from the Gila River headwaters  
 22 and tributaries containing endangered species habitat in order to issue not likely to  
 23 adversely affect findings for impacted species and critical habitat.

24 175. The **Taylor Creek allotment** includes approximately three miles of the  
 25 East Fork Gila River (2.5 miles on private land) containing designated critical habitat for  
 26 the loach minnow and spokedace and proposed critical habitat for the narrow-headed  
 27 garter snake; 3.4 miles of Beaver Creek containing designated critical habitat for  
 28

1 Chiricahua leopard frog; and nine miles of Taylor Creek, which is occupied by headwater  
2 chub. The Taylor allotment is contained entirely within the Gila Wilderness.

3 176. Under the Grazing Criteria, a not likely to adversely affect finding for the  
4 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no  
5 livestock use or livestock management activities” where the species is reasonably certain  
6 to occur.

7 177. The USFS Biological Assessment states that livestock are excluded from  
8 East Fork Gila River, Beaver Creek, and Taylor Creek on the Taylor Creek allotment.

9 178. The Center’s Gila Grazing Assessment found 0.9 miles of moderate cattle  
10 impacts and 3.5 miles of significant cattle impacts on Beaver Creek and Taylor Creek on  
11 the **Taylor Creek allotment**, including cows inside exclosure areas, lack of fencing,  
12 severe impacts on herbaceous growth and woody regeneration, wallows and bare ground,  
13 downed fences, bank shearing, and long-term suppression of woody regeneration,  
14 contradicting the Agencies’ commitment to exclude cattle from Beaver Creek and Taylor  
15 Creek within the Taylor Creek allotment.

16 179. The **Jordan Mesa allotment** includes approximately 5.7 miles of the East  
17 Fork Gila River containing designated critical habitat for the loach minnow and  
18 spikedace and proposed critical habitat for the narrow-headed garter snake. The Jordan  
19 Mesa allotment is contained entirely within the Gila Wilderness.

20 180. Under the Grazing Criteria, a not likely to adversely affect finding for the  
21 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no  
22 livestock use or livestock management activities” where the species is reasonably certain  
23 to occur.

24 181. The USFS Biological Assessment states that the entire East Fork Gila River  
25 will be closed to grazing on the Jordan Mesa allotment, but that the allotment currently  
26 remains in non-use.

27 182. The Center’s Gila Grazing Assessment found 3.7 miles of moderate cattle  
28 impacts and 2.6 miles of significant cattle impacts on East Fork Gila River on the **Jordan**

1 **Mesa allotment**, including signs of cattle use or movement throughout the entire survey  
2 area, severe browse pressure on all woody regeneration, and fencing in disrepair,  
3 contradicting the Agencies' commitment to exclude cattle from the East Fork Gila River  
4 within the Jordan Mesa allotment.

5 183. The **XSX allotment** includes portions of the East Fork Gila River  
6 containing designated critical habitat for the loach minnow and spikedace and proposed  
7 critical habitat for the narrow-headed garter snake; 4.6 miles of the Gila River containing  
8 designated critical habitat for the loach minnow and spikedace and proposed critical  
9 habitat for the northern Mexican garter snake and narrow-headed garter snake; and  
10 portions of West Fork Gila River. The XSX allotment is contained entirely within the  
11 Gila Wilderness. According to USFS, the XSX allotment is grazed one in every three  
12 years.

13 184. Under the Grazing Criteria, a not likely to adversely affect finding for the  
14 narrow-headed garter snake, loach minnow, and spikedace requires that there "will be no  
15 livestock use or livestock management activities" where the species is reasonably certain  
16 to occur.

17 185. The Biological Assessment states that the Middle Fork, East Fork, and Gila  
18 River are excluded from grazing on the XSX allotment.

19 186. The Center's Gila Grazing Assessment found one mile of moderate cattle  
20 impacts on the East Fork Gila River on the **XSX allotment**, contradicting the Agencies'  
21 commitment to exclude cattle from within the XSX allotment.

22 187. These findings contradict the Agencies' commitment in their ESA section 7  
23 consultation to exclude cattle from the Gila River headwaters and tributaries on the  
24 **Taylor Creek, Jordan Mesa, and XSX allotments**, and demonstrate that USFS has not  
25 been conducting required monitoring or taken required corrective action.

26 188. The Center's surveys documented cattle impacts on two Gila River  
27 headwaters allotments that are considered vacant by USFS, including significant impacts  
28 on the purportedly excluded East Fork Gila River on the **Diamond Bar allotment**, and

1 significant impacts on the purportedly excluded Miller Springs/Turkey Creek area of the  
2 **former Glenn (Wilderness) allotment**. These findings contradict the Agencies'  
3 commitment in their ESA section 7 consultation to exclude cattle from the Gila River and  
4 other riparian areas occupied by endangered species, and the larger commitment to keep  
5 the allotment in non-use, and demonstrate that USFS has not been conducting required  
6 monitoring or taken required corrective action.

7 189. The USFS October 17, 2019 NOI response letter acknowledges compliance  
8 issues on the **Taylor Creek** and **Jordan Mesa allotments**, and states that USFS will  
9 reinitiate consultation on the **Taylor Creek allotment** in Fiscal Year 2020 to address  
10 newly listed species including narrow-headed garter snakes, but this consultation has not  
11 yet resulted in a final Biological Assessment or Biological Opinion, and USFS is not  
12 ensuring that cattle are removed from riparian areas pending completion of such  
13 consultation.

14 **Gila National Forest Allotments (Gila River)**

15 190. After the headwaters converge, the upper Gila River flows through a large  
16 portion of the Gila Wilderness, and then further downstream enters into a mixture of  
17 Forest Service, private, and other federal and state lands in New Mexico before crossing  
18 the Arizona state line.

19 191. FWS has made specific decisions constituting final agency concurring with  
20 USFS Biological Assessments concluding section 7 consultations for the renewal of ten-  
21 year grazing permits and associated issuance of AMPs for allotments within the Gila  
22 River including the **Brock Canyon** and **Gila River allotments**. In conformance with the  
23 Grazing Criteria, all of these Biological Assessments committed USFS to the exclusion  
24 of cattle from the Gila River in order to issue not likely to adversely affect findings for  
25 impacted species and critical habitat.

26 192. The **Brock Canyon allotment** includes approximately fourteen miles of  
27 the Gila River containing designated critical habitat for the southwestern willow  
28

1 flycatcher, Gila chub, loach minnow, and spikedace and proposed critical habitat for the  
2 narrow-headed garter snake.

3 193. Under the Grazing Criteria, a not likely to adversely affect finding for the  
4 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no  
5 livestock use or livestock management activities” where the species is reasonably certain  
6 to occur.

7 194. The USFS Biological Assessment states that the entire Brock Canyon  
8 allotment is in non-use.

9 195. The Center’s Gila Grazing Assessment found significant cattle impacts  
10 throughout the Brock Canyon allotment on the Gila River. The Brock Canyon allotment  
11 is contained largely within the Gila Wilderness.

12 196. These findings contradict the Agencies’ commitment in their ESA section 7  
13 consultation to exclude cattle from the Gila River and other riparian areas on the **Brock**  
14 **Canyon allotment**, and the larger commitment to keep the allotment in non-use, and  
15 demonstrate that USFS has not been conducting required monitoring or taken required  
16 corrective action.

17 197. The **Redstone allotment** includes approximately fourteen miles of the Gila  
18 River containing designated critical habitat for the southwestern willow flycatcher, Gila  
19 chub, loach minnow, and spikedace and proposed critical habitat for the narrow-headed  
20 garter snake. The Redstone allotment is contained largely within the Gila Wilderness.

21 198. Under the Grazing Criteria, a not likely to adversely affect finding for the  
22 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no  
23 livestock use or livestock management activities” where the species is reasonably certain  
24 to occur.

25 199. The USFS Biological Assessment did not address the Redstone allotment,  
26 which was considered vacant and was officially ungrazed since 1999. In 2012, USFS  
27 reopened the Wildhorse Mesa Pasture on the Redstone allotment.  
28



1           200. The Center’s Gila Grazing Assessment found significant cattle impacts  
2 throughout the **Redstone allotment** on the Gila River.

3           201. These findings contradict the Agencies’ commitment in their ESA section 7  
4 consultation to exclude cattle from the Gila River and other riparian areas occupied by  
5 endangered species, and the larger commitment to keep the allotment in non-use, and  
6 demonstrate that USFS has not been conducting required monitoring or taken required  
7 corrective action.

8           202. The **Gila River allotment** includes approximately eleven miles of the Gila  
9 River containing designated critical habitat for the southwestern willow flycatcher, loach  
10 minnow, and spikedace and proposed critical habitat for the yellow-billed cuckoo,  
11 northern Mexican garter snake, and narrow-headed garter snake.

12           203. Under the Grazing Criteria, a not likely to adversely affect finding for the  
13 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no  
14 livestock use or livestock management activities” where the species is reasonably certain  
15 to occur.

16           204. The USFS Biological Assessment states that the Gila River is excluded  
17 from grazing.

18           205. The Center’s Gila Grazing Assessment found 0.8 miles of moderate cattle  
19 impacts, and 4.3 miles of significant cattle impacts on the Gila River within the **Gila**  
20 **River allotment** including downed fences, severe trampling, long-term heavily grazed  
21 patches, heavy browsing on woody regeneration, bank degradation, and breaches in  
22 fencing.

23           206. These findings contradict the Agencies’ commitment in their ESA section 7  
24 consultation to exclude cattle from the Gila River and other riparian areas on the **Gila**  
25 **River allotment**, and the larger commitment to keep the allotment in non-use, and  
26 demonstrate that USFS has not been conducting required monitoring or taken required  
27 corrective action.  
28

## CLAIMS FOR RELIEF

### Claim I

#### **Failure to Reinitiate and Complete ESA Section 7 Consultation to Ensure Ongoing Livestock Grazing Does Not Jeopardize Listed Species or Destroy or Adversely Modify Critical Habitat (ESA Violation of 16 U.S.C. § 1536(a)(2) and 50 C.F.R. § 402.16)**

207. Plaintiff incorporates all preceding paragraphs by reference.

208. USFS has authorized livestock grazing on 36 grazing allotments identified in the paragraphs above and listed in **Table 1** through final agency actions including the issuance of term grazing permits, allotment management plans (“AMPs”), and allotment annual operating instructions (“AOIs”).

209. The Agencies have relied upon the USFS’s commitments to exclude cattle from riparian areas—typically through fencing—as a foundation for meeting their obligations under the Endangered Species Act to ensure that USFS’s grazing authorizations do not jeopardize the continued existence of endangered species or result in the destruction or adverse modification of their designated critical habitat. Specifically, in carrying out their consultation duties pursuant to section 7 of the ESA for the specific grazing authorizations challenged in this action, the Agencies have determined that the impacts of domestic livestock grazing on endangered riparian species are insignificant based largely on commitments that designated streamside habitat is excluded from cattle and that USFS will regularly monitor riparian areas in order to ensure that the fencing exclusions remain intact and effective. These commitments include requirements specific to each listed threatened or endangered species, as detailed in the “Master Framework for Streamlining Consultation on Livestock Grazing Activities” (December 2015), also called the Grazing Guidance Criteria.

210. Plaintiff Center for Biological Diversity conducted on-the-ground assessments to determine if cattle are present within riparian areas excluded from cattle on grazing allotments in the Apache-Sitgreaves and Gila National Forests in 2017, 2018, and 2019. These assessments documented that purported fencing exclusions were

1 frequently in disrepair or absent, resulting in widespread cattle presence and associated  
2 extensive damage to riparian areas.

3       211. The ESA places ongoing obligations on federal agencies to ensure that their  
4 actions do not jeopardize the continued existence of endangered species or adversely  
5 modify or destroy their designated critical habitat, including the duty to reinitiate section  
6 7 consultation in four circumstances. 50 C.F.R. § 402.16(a)(1)-(4). Agencies must  
7 reinitiate consultation, for example, “[i]f the amount or extent of taking specified in the  
8 incidental take statement is exceeded,” when “[n]ew information reveals effects of the  
9 action that may affect listed species or critical habitat in a manner or to an extent not  
10 previously considered,” or when “[t]he identified action is subsequently modified in a  
11 manner that causes an effect to the listed species or critical habitat that was not  
12 considered in the biological opinion.” *Id.* § 402.16(a)(1)-(3).

13       212. The grazing assessment reports provided the Agencies with documentation  
14 of extensively damaged, ineffective, or absent fencing and associated riparian use and  
15 damage by cattle on the 36 permitted grazing allotments. These findings contradict the  
16 requirements and commitments made pursuant to application of the Grazing Guidance  
17 Criteria, and/or exceed the levels of permissible incidental take established through the  
18 relevant consultations, and thus undermine the legality of section 7 consultation decisions  
19 authorizing grazing on the identified allotments, as all of these decisions relied upon the  
20 purported exclusion of cattle from southwestern rivers and streams as a foundation for  
21 those decisions.

22       213. The Agencies were required to reinitiate and complete consultation when  
23 presented with evidence documenting extensive cattle use and associated lack of USFS  
24 monitoring of the riparian streamside areas of specific allotments within the upper Gila  
25 River watershed on the Apache-Sitgreaves and Gila National Forests. The USFS’s failure  
26 in fact to exclude domestic livestock from occupied threatened and endangered species  
27 habitat specifically triggers the reinitiation thresholds at 50 C.F.R. § 402.16(a). By failing  
28

1 to reinitiate and complete consultation despite the fact that the reinitiation criteria are  
2 satisfied, the Agencies are in violation of 50 C.F.R. § 402.16.

3 214. The Agencies are in ongoing violation of the ESA for livestock grazing on  
4 the grazing allotments identified in the paragraphs above and listed in **Table 1**. 16 U.S.C.  
5 § 1536(a)(2); 50 C.F.R. § 402.16. By failing to take effective actions to exclude livestock  
6 from these allotments, or to remediate the extensive natural resource damage to occupied  
7 endangered species streamside and riparian habitat and designated critical habitat that has  
8 been demonstrated in the Center's assessments, USFS is in ongoing violation of the  
9 substantive ESA section 7(a)(2) requirement that federal agencies ensure their actions are  
10 not likely to jeopardize the continued existence of any listed species or result in the  
11 destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2).

12 215. Plaintiff and its members are injured by the Agencies' violations of ESA  
13 section 7(a)(2) and failure to reinitiate and complete consultation.

14 216. The Agencies' violations of section 7(a)(2) of the ESA are subject to  
15 judicial review under the ESA citizen suit provision, 16 U.S.C. § 1540(g)(1), and/or the  
16 APA, 5 U.S.C. §§ 701-706. An Order of the Court directing compliance with 50 C.F.R. §  
17 402.16 and ESA section 7 would redress Plaintiff's injuries.

18 **Claim II**  
19 **Unlawful Irreversible or Irretrievable Commitment of Resources**  
20 **Pending Completion of Consultation**  
21 **(ESA Violation of 16 U.S.C. 1536(d))**

22 217. Plaintiff incorporates all preceding paragraphs by reference.

23 218. USFS's October 17, 2019 NOI response letter does not provide any specific  
24 timeline or other clear commitment for completing the vast majority of the required  
25 reinitiated consultations and does not acknowledge that such reinitiation is required for  
26 many allotments. Cattle continue to access purportedly excluded riparian areas, even  
27 though the Agencies have determined that such exclusion is necessary to avoid  
28

1 jeopardizing listed species or the destruction or adverse modification of their designated  
2 critical habitat.

3       219. ESA section 7(d) provides that once an agency initiates or reinitiates  
4 section 7 consultation, the agency “shall not make any irreversible or irretrievable  
5 commitment of resources with respect to the agency action which has the effect of  
6 foreclosing the formulation or implementation of any reasonable and prudent alternative  
7 measures which would not violate subsection (a)(2).” 16 U.S.C. § 1536(d). The purpose  
8 of section 7(d) is to prevent harm to endangered species and designated critical habitat  
9 pending the completion of section 7 consultation. In this case, USFS must take immediate  
10 action to prevent permittees from foreclosing conservation options that might otherwise  
11 be available upon the completion of consultation.

12       220. USFS has failed to exclude cattle from riparian areas occupied by listed  
13 threatened or endangered species, and/or containing designated critical habitat for such  
14 species, within the grazing allotments identified in the paragraphs above and listed in  
15 **Table 1** in violation of ESA section 7(d), 16 U.S.C. § 1536(d).

16       221. Plaintiff and its members are injured by USFS’ violations of ESA section  
17 7(d). USFS’ violations of section 7(d) of the ESA are subject to judicial review under the  
18 ESA citizen suit provision, 16 U.S.C. § 1540(g)(1), and/or the APA, 5 U.S.C. §§ 701-  
19 706. An Order of the Court directing compliance with ESA section 7(d) would redress  
20 Plaintiff’s injuries.

### 21 **Claim III**

#### 22 **Failure to Develop and Implement a Program to Conserve Listed Species Impacted** 23 **by the Forest Service’s Grazing Program and Unauthorized Grazing** 24 **(ESA Violation of 16 U.S.C. § 1536(a)(1))**

25       222. Plaintiffs incorporate all preceding paragraphs by reference.

26       223. USFS has violated its affirmative obligation to “engage in consultation with  
27 the FWS” so as to “carry[] out programs for the conservation” of listed species impacted  
28 by its grazing program. 16 U.S.C. § 1536(a)(1). As detailed in this Complaint, permitted

1 cattle, as well as feral or unbranded cattle, are routinely accessing streamside and riparian  
2 areas that are purportedly excluded from those livestock, causing widespread and  
3 significant damage to habitat occupied by endangered and threatened species, and/or their  
4 designated critical habitat.

5       224. This damage is occurring in the 36 permitted allotments, as well as the 4  
6 allotments that are formally designated as vacant. Unlike the permitted allotments, the  
7 Agencies have engaged in no consultation regarding the impacts of grazing on the  
8 purportedly vacant allotments. The Center's surveys demonstrated that these vacant  
9 allotments—which are located within the Blue Range Primitive Area and Gila  
10 Wilderness Area—are experiencing intensive and damaging unauthorized grazing.

11       225. USFS' actions to remove unauthorized cattle from streamside and riparian  
12 areas on both the 36 permitted and 4 vacant allotments that are purportedly excluded  
13 from livestock have been, at best, ineffectual and temporary in nature. Fencing intended  
14 to exclude cattle is frequently absent, in disrepair, or otherwise ineffective. USFS has not  
15 conducted required monitoring to ensure that cattle are in fact excluded from streamside  
16 and riparian areas, and has not implemented adequate enforcement actions to compel  
17 corrective action. USFS' efforts to remove unauthorized permitted cattle, and feral or  
18 unbranded cattle, from purportedly excluded streamside and riparian areas, have not been  
19 successful. Consequently, cattle continue to access streamside and riparian areas that are  
20 purportedly excluded from such cattle.

21       226. Even if USFS was successful in finally excluding cattle from purportedly  
22 excluded streamside and riparian areas, the agency has failed to develop and implement,  
23 in consultation with FWS, corrective measures for mitigating the extensive damage this  
24 unauthorized grazing has caused to threatened or endangered species and/or their  
25 designated critical habitat on the 36 permitted allotments and 4 vacant allotments. 16  
26 U.S.C. § 1536(a)(1). USFS' failure to "utilize [its] authorities . . . by carrying out  
27 programs for the conservation of endangered species" in consultation with and with the  
28 assistance of FWS violates section 7 (a)(1) of the ESA. *Id.*

**REQUEST FOR RELIEF**

Wherefore, Plaintiff respectfully requests that the Court:

1. Declare that Defendants are violating section 7(a)(2) of the Endangered Species Act and 50 C.F.R. § 402.16 by failing to reinitiate and complete consultation on the grazing allotments identified in the paragraphs above and listed in **Table 1** in order to ensure that grazing activities on those allotments do not jeopardize the continued existence of listed species or result in the destruction or adverse modification of their designated critical habitat;

2. Declare that USFS is violating Section 7(d) of the Endangered Species Act by failing to remove all cattle within purportedly excluded riparian areas on the 36 permitted grazing allotments identified above and listed in Table 1, pending the completion of reinitiated consultation;

3. Declare that USFS is violating Section 7(a)(1) of the Endangered Species Act by failing, in consultation with and with the assistance of FWS, to develop and implement a program to conserve listed species impacted by the agency's grazing program, including the failure to mitigate damage caused by unauthorized permitted cattle, and feral or unbranded cattle, to streamside and riparian streamside providing habitat for listed species on the 36 permitted grazing allotments and 4 vacant grazing allotments identified above and listed in Table 1;

4. Order USFS to remove all cattle within purportedly excluded riparian areas on the 36 permitted grazing allotments and 4 vacant grazing allotments identified above and listed in Table 1 within ten days of this Court's Order;

5. Order USFS to identify sources of unauthorized livestock use in the upper Gila River watershed riparian areas on the 36 permitted grazing allotments and 4 vacant grazing allotments identified above and listed in Table 1 within three months, and within six months, make necessary repairs to fencing infrastructure to prevent future unauthorized use. In areas where unauthorized cattle use cannot be remedied by existing infrastructure, or where the maintenance of existing exclusions has proven to be



1 infeasible, USFS shall relocate fencing or close pastures to grazing as necessary to  
2 prevent further unauthorized riparian grazing;

3         6.       Order USFS to commit to monthly inspection of riparian areas within  
4 vacant allotments, and within excluded riparian areas on permitted allotments when cattle  
5 are in a pasture adjacent to purportedly excluded riparian areas, and to weekly inspections  
6 if there is a “water gap” in the pasture; further Order USFS to immediately make these  
7 inspections available through a website portal or similar means;

8         7.       Order the Agencies to reinitiate and complete consultation on the 36  
9 permitted grazing allotments identified in the paragraphs above and listed in Table 1;

10        8.       Order USFS, in consultation with and with the assistance of FWS, to  
11 develop a program for the conservation of endangered and threatened species impacted  
12 by USFS’ grazing program, including actions to mitigate damage caused by unauthorized  
13 permitted cattle, and feral or unbranded cattle, to streamside and riparian streamside  
14 providing habitat for listed species on the 36 permitted grazing allotments and 4 vacant  
15 grazing allotments;

16        9.       Grant Plaintiff its reasonable attorneys’ fees and costs associated with this  
17 action, as provided by the ESA, § 1540(g)(4), or the Equal Access to Justice Act, 28  
18 U.S.C. § 2412; and

19        10.      Provide such additional relief as the Court may deem just and proper.

20 Respectfully Submitted this 3rd day of December, 2020.

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**TABLE 1**

**Apache National Forest Allotments**

Blue River: Red Hill, Cow Flat, Fishhook-Steeple Mesa, Raspberry, Sandrock  
(vacant), Pigeon

Eagle Creek: East Eagle, Mud Springs, Double Circle, Tule, Dark Canyon

San Francisco River: Wildbunch (also on Blue River), Pleasant Valley, Hickey

**Gila National Forest Allotments**

Gila River Headwaters: Wilderness (formerly Glenn)(vacant), Diamond Bar  
(vacant), Jordan Mesa, Taylor Creek, and XSX

Gila River: Redstone (vacant), Brock Canyon, Gila River

Tularosa River: Corner Mountain, Negrito/Yeguas, Eagle Peak, Govina, West  
Sand Flat, Alexander, Deep Canyon, Lower Plaza

San Francisco River: Luna, Cienega, Henley, Frisco Plaza, Kelly, Devil's Park,  
Alma, Citizen, Roberts Park, Harve Gulch, Bighorn, Dry Creek